

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Draft Resolution Adopting New Regulations Regarding Public Access to Records of the California Public Utilities Commission and Requests for Confidential Treatment of Records	Draft Resolution No.: L-436
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**COMMENTS OF THE CALIFORNIA ASSOCIATION OF COMPETITIVE  
TELECOMMUNICATIONS COMPANIES (CALTEL) ON DECEMBER 20, 2012  
REVISED DRAFT RESOLUTION L-436**

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## **1. INTRODUCTION**

CALTEL believes that the current revision of the Draft Resolution is an improvement in some limited respects over the previous draft. This includes the Draft Resolution's apparent determination to leave General Order 66-C in place until the process of workshops and development of matrices is completed.

However, as described below, other aspects of the Draft Resolution overwhelm the potential benefits of that change in several respects, and create significant business uncertainty regarding whether market share and financial data and information that CALTEL's members are required to file in coming months will be kept confidential. Therefore, from both a legal and business perspective, the revised Draft Resolution remains seriously deficient, and should not be approved without substantial further revision in the context of a formal rulemaking proceeding.

CALTEL here highlights the most significant of those deficiencies, without waiver of its right to request revision or deletion of others. The deficiencies in the current Draft Resolution include:

- ▶ Use of an inadequate and unfair process for development and revision of the Draft Resolution, and the need for consideration of the issues in a full rulemaking;
- ▶ Unlawful administrative repeal of Section 583 of the Public Utilities Code;
- ▶ Significant business uncertainty caused by potential retroactive application of provisions of the Draft Resolution to previously filed documents and data, as well as documents and data that are required to be filed with the Commission in the near future;
- ▶ Improper grant of discretion to Commission Staff where a CPRA exemption exists;

- ▶ Failure to provide notification to affected companies whose confidential information is sought from the Commission by third parties; and,
- ▶ Failing to frame the Draft Resolution as a template for workshops, without foreclosing the consideration of complex legal and public policy issues, as promised by Legal Division staff and the Commission's General Counsel.

Each of these is discussed below.

## **2. THE PROCESS FOR DEVELOPMENT AND REVISION OF THE DRAFT RESOLUTION IS INADEQUATE AND UNFAIR**

The process for the development and revision of the Draft Resolution remains deficient. CALTEL's representatives continue not to receive consistent service of these revisions, despite repeated requests to be included.

Moreover, in the present resolution process, the complexity and detail involved in these issues cry out for a more ordered regular rulemaking proceeding with a truly neutral decision-maker. This would resolve the conflict inherent in having Legal Division Staff serving in effect as both an advocate and a judge in the proceeding. The problem that these dual, conflicting roles create is underlined by the Draft Resolution's approach to the provision of Section 583 relating to improper disclosures of confidential information by Commission employees, including Legal Division Staff. The Legal Division Staff obviously has not been neutral in consistently proposing a Resolution which effectively eviscerates the Section 583 misdemeanor provisions which otherwise apply should that

same Staff unlawfully disclose confidential information of a public utility.<sup>1</sup> This improper, proposed administrative repeal of statutory misdemeanor liability under Section 583 flows directly from the Resolution's reversal of the presumption of confidentiality contained in Section 583, discussed below. This is but one example of the dual and conflicting role that the Legal Division Staff is serving under the current Resolution process, which would not exist if this were instead a rulemaking proceeding.

### **3. THE DRAFT RESOLUTION UNLAWFULLY REPEALS OR AMENDS SECTION 583**

The Draft Resolution continues to pretend in effect that Section 583 of the Public Utilities Code does not exist, and that the Commission can deal with public utility confidential information under the provisions of the CPRA alone.

However, the plain language of Section 583 creates, at a minimum: 1) a *presumption of confidentiality* for utility confidential filings which the Commission must honor and 2) a specified *procedure for overcoming that presumption* which the Commission must follow. Section 583 is different in these respects than the CPRA, which does not create the same presumption and procedure. Section 583 is in fact a specific statutory exception to the way in which the CPRA operates in agencies which are not subject to Section 583.

Section 583 cannot be read as an invitation to the Commission to use the procedure that statute provides to reverse the statutory presumption which the same

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<sup>1</sup> The Legal Division Staff's discomfort with the law as it exists is palpable, and Staff's intent to undo these plainly effective requirements of law is clear:

Staff concerns that they may be charged with a misdemeanor, pursuant to § 583, if they disclose records furnished by a utility in the absence of a CPUC order specifically authorizing such disclosure, have a definite chilling effect on the public disclosure of CPUC records. Draft Resolution at p. 6.

Of course, this "chilling effect" on Staff disclosure of confidential utility documents and information is precisely the intended effect of Section 583.

statute also provides or to read it out of the law. If the Legislature had wished to make the presumption the same under Section 583 as under the CPRA, it would have said so. The fact that Section 583 makes it a misdemeanor for Commission employees to disclose documents which have not been specifically determined by the Commission to be non-confidential underlines the seriousness with which the Legislature determined that public utility confidential information should be treated differently than confidential information filed with other agencies.

The revised Draft Resolution therefore contravenes the law directly applicable to the Commission's treatment of confidential documents. Indeed, the fact that the Commission sought in the last session of the Legislature to repeal or dilute Section 583 is plain recognition by the Commission that Section 583 imposes legal obligations on the Commission which do not exist under the CPRA standing alone. The Legislature has not repealed or modified Section 583, and Legal Division Staff's attempts to administratively amend or repeal Section 583 must be rejected out of hand.

**4. THE DRAFT RESOLUTION PURPORTS TO APPLY RETROACTIVELY TO INFORMATION FILED CONFIDENTIALLY IN RELIANCE ON APPLICABLE RULES AND PROCEDURES**

As CALTEL discussed in its July 27, 2012 Comments, the Draft Resolution unnecessarily creates uncertainty regarding information filed in the past, which was filed under the provisions of General Order 66-C or its predecessor.<sup>2</sup> The latest iteration of the Draft Resolution does nothing to allay this concern. Indeed, the latest Draft Resolution amplifies the concern because it specifically permits the Commission to disclose such

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<sup>2</sup> CALTEL July 27, 2012 Comments at pp. 11-13.

information where the Commission did not previously expressly act upon a communications company request for confidentiality.<sup>3</sup>

In addition, while the proposed workshops, the creation of new matrices, and the process of adopting a new General Order to replace GO 66-C are proceeding, CALTEL's members will make many filings with the Commission. This includes, for example, company annual reports which are due by April 1, 2013; CALTEL therefore will be forced to begin discussions with Communications Division Staff this month to work out a process for ensuring that financial and other competitively significant information is deemed confidential before submission. Under the proposed Draft Resolution, in order to ensure the confidentiality of data submitted in these reports and other filings, CALTEL will be compelled to advise its members to withhold their confidential information until a ruling can be obtained from the Commission that this information is confidential. This will require unnecessary action by CALTEL member companies, as well as unnecessary work by the Communications Division and Legal Division staffs, and potentially Commissioners and their advisors.

For these reasons, the Draft Resolution should be revised to guarantee that any revised procedures and standards will not be applied retroactively to confidential information filed under General Order 66-C.

**5. THE DRAFT RESOLUTION IMPROPERLY GRANTS DISCRETION TO THE LEGAL DIVISION STAFF TO DENY THE APPLICATION OF A CPRA EXEMPTION TO CONFIDENTIAL MATERIALS**

CALTEL previously discussed at length the attempt by the Draft Resolution to give the Legal Division Staff the authority to determine that the application of CPRA

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<sup>3</sup> Draft Resolution at pp. 91-93

exemptions to a particular document is “not appropriate.”<sup>4</sup> Even if the CPRA provided such authority, it should not under any circumstances be exercised by Commission Staff without Commission review and approval, and the opportunity by the affected company to be heard. Staff should perform at most a ministerial role, once matrices are developed. This cannot include the determination of whether the application of a CPRA-provided exemption should be waived, even if the Commission had such authority.

In addition, CALTEL believes that the cases cited by the Legal Division in support for the discretion to waive CPRA exemptions do not support the proposition for which they are cited. Once again, the Legal Division Staff conflates its advocacy and neutral decision-maker roles to argue for its own authority to perform tasks which at most reside in the Commission’s sole non-delegable authority.<sup>5</sup>

**6. THE DRAFT RESOLUTION FAILS TO REQUIRE NOTIFICATION TO AFFECTED COMPANIES WHOSE CONFIDENTIAL INFORMATION IS SOUGHT FROM THE COMMISSION BY THIRD PARTIES**

CALTEL previously discussed this issue in its July 27, 2012 Comments on the previous iteration of the Draft Resolution.<sup>6</sup> Affected companies must be provided with notice and an opportunity to be heard before their confidential information is turned over to third parties proceeding by subpoena or other discovery request. This is especially

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<sup>4</sup> CALTEL July 27, 2012 Comments at pp. 3-11.

<sup>5</sup> The cases which the Draft Resolution cites for this proposition involve investigative records of the respective agencies involved. The decisions revolve around the specific statutory language of Government Code Section 6254(f) permitting disclosure of “records concerning the **administration of the agency.**”

Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law. This is not a broad grant of authority to agencies to permit inspection of all confidential materials held by an agency regardless of their nature. Investigations by their nature are “records concerning the administration of the agency” and this statutory provision is the basis upon which disclosure was permitted in these cases. Moreover, Section 6254(f) specifically prohibits the disclosure of documents where “disclosure is otherwise prohibited by law.” As CALTEL described in its previous comments, the disclosure of company trade secret information is “otherwise prohibited by law.” CALTEL January 27, 2012 Comments at pp. 4-10.

<sup>6</sup> CALTEL January 27, 2012 Comments at pp14-15.

critical in light of the Draft Resolution's claim that the Commission has the discretionary ability to override express CPRA exemptions.

**7. THE LEGAL DIVISION STAFF FAILS TO PRESENT THE DRAFT RESOLUTION AS A TEMPLATE FOR WORKSHOPS, WITHOUT FORECLOSING THE CONSIDERATION OF ANY ISSUES**

The issues in the now extraordinarily lengthy Draft Resolution, as noted, are numerous and complex, both as to law and as to public policy. As a result, CALTEL recommends that the Draft Resolution should be revised to set a framework for discussion, and should provide that it is not intended to foreclose discussion or advocacy of any legal or policy issue which may be involved in these important matters.

**8. CONCLUSION**

CALTEL urges the Commission to reconstitute the present proceeding as a rule-making. The Legal Division Staff cannot serve as a neutral decision-maker and advisor in this proceeding, when that same Staff has a direct and indeed personal interest in the outcome of the proceeding on Section 583 issues.

Should the Commission nevertheless decide to continue using the Resolution process, then the Commission should make the changes recommended by CALTEL here and in its comments on the previous draft submitted on July 27, 2012.

Respectfully submitted,

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